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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME NEGRETE,

Defendant and Appellant.

F044797

(Super. Ct. Nos. 03CM7577 &
03CM3951)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Charles A. French and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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Pursuant to a negotiated plea, appellant Jaime Negrete admitted two offenses and a prior strike in exchange for dismissal of an attempted murder charge and two enhancement allegations. While entering his plea, he acknowledged that he faced a

* Before Dibiaso, Acting P.J., Harris, J., and Levy, J.

maximum term of 10 years, composed of the upper term and a consecutive term. The court imposed the 10-year term. Appellant now challenges that sentence under *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531] (*Blakely*). We will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Pursuant to a negotiated plea bargain, appellant agreed to plead guilty in two separate cases to possession of a sharp instrument by an inmate (Pen. Code, § 4502, subd. (a))¹ and assault with a deadly weapon (§ 245, subd. (a)(1)). He also agreed to admit a prior strike allegation (§ 1170.12, subd. (a)–(d), § 667, subd. (b)–(i)). In return, an attempted murder charge, a great bodily injury enhancement, and a prior prison term enhancement were dismissed.

In taking appellant’s plea, the court advised him of his trial rights, including the right to a jury trial. Appellant expressly waived each right. The court also advised appellant of the consequences of his plea including that the relevant term for both the assault and the possession counts was either two, three, or four years doubled to four, six, or eight years because of his prior strike. If the terms were run consecutively, the maximum period of time he could be incarcerated was 10 years. The court added, “I understand you could receive up to the maximum that I’ve told you about; is that your understanding as well, sir?” To which appellant responded, “yes.”

Appellant agreed with the recited factual bases for his plea: on May 9, 2003, while incarcerated at the Substance Abuse Treatment Facility, he was searched and found to have a sharp razor blade in his clothing. On October 30, 2003, while incarcerated in the Kings County Jail, he asked the victim to deliver a “kite.” When the victim approached his cell, appellant held him close and slashed the victim’s neck and arm with a razor blade.

¹ Further statutory references are to the Penal Code unless otherwise indicated.

At sentencing, the court found in mitigation that appellant pled at an early stage of the proceedings but offset that factor by the benefit he received under the terms of the plea agreement. The court found in aggravation that appellant was on parole when he committed the assault, he was incarcerated when he committed both offenses, his record showed a disregard for the law, and the assault was vicious, callous and appeared to be planned. The court found the factors in aggravation outweighed the factors in mitigation and imposed a 10-year term consisting of the upper term doubled for the assault and a consecutive term doubled for the possession.

Appellant filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, but subsequently effectively withdrew that brief by challenging his upper term and consecutive sentence under *Blakely, supra*, 124 S.Ct. 2531.

DISCUSSION

Blakely and the Upper Term

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Blakely* held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose based *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” Thus, when a sentencing court’s authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 124 S.Ct. at p. 2537.)

Appellant contends the court committed structural error by imposing an upper term and a consecutive term based on facts that were neither found by the jury nor admitted by him. We find his arguments unpersuasive. Regardless of whether *Blakely*

applies to California's determinate sentencing scheme, there was no *Blakely* error in this case in light of appellant's admissions pursuant to the negotiated plea that the maximum period of time he could be incarcerated for the offenses and prior conviction he was admitting was 10 years.

Plea bargaining is a judicially and legislatively recognized procedure that provides reciprocal benefits to the People and the defendant. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; *People v. Orin* (1975) 13 Cal.3d 937, 942; § 1192.5.) When as part of a plea agreement, a defendant agrees to the maximum sentence that may be imposed, he necessarily admits that his conduct is sufficient to expose him to that punishment and reserves only the exercise of the trial court's sentencing discretion in determining whether to impose that sentence. (See Advisory Com. com., Cal. Rules of Court, rule 4.412(b)) ["a defendant who, with the advice of counsel, expresses agreement to a specified prison term normally is acknowledging that the term is appropriate for his or her total course of conduct."].) *Apprendi* and *Blakely* do not preclude the exercise of discretion by a sentencing court so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. (*Blakely, supra*, 124 S.Ct. at p. 2541.)

That is the case here. Appellant agreed, pursuant to a plea agreement, that he faced a 10-year maximum sentence. Appellant in effect admitted the existence of facts necessary to impose that upper term, and nothing more is required under *Blakely*. (*People v. Ackerman* (2004) 124 Cal.App.4th 184, 197.)

Further, a defendant may be estopped from complaining about a sentence, even if it is unauthorized, if the defendant agreed to it as part of a plea agreement. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) When a defendant contends that the trial court's sentence violates rules that would have required the imposition of a more lenient sentence, but he or she avoided a potentially harsher sentence by entering into the plea bargain, the court will imply that the defendant waived any rights under such rules by

choosing to accept the plea bargain. (*Ibid.*) “The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*Ibid.*) Here, appellant pled guilty to two offenses and, in return, an attempted murder charge and two enhancement allegations were dismissed. As the trial court noted, appellant avoided a harsher sentence by entering into the plea agreement. We thus imply that he waived any potential right under *Blakely* by choosing to accept the plea bargain.

Finally, any *Blakely* error would be harmless in this case. The reasons the trial court gave for imposing the upper term for the assault were appellant was on parole when he committed the offense, he was incarcerated when he committed both offenses, his record showed a disregard for the law, and the assault was vicious, callous, and appeared to be planned. The recidivist factors were included in the probation report prepared for sentencing and appellant did not contest them.

The rule of *Apprendi* and *Blakely* does not apply to the fact of a prior conviction used to increase the penalty for a crime. (*People v. Betts* (2004) 34 Cal.4th 1039, 1054.) While the trial court did not expressly rely on the fact of a prior conviction in imposing the upper term, it relied on facts essentially analogous to the fact of a prior conviction: being on parole, being incarcerated, and a criminal record that showed a disregard for the law. And, regardless of whether all of the factors the court utilized fell within the prior conviction exception, one valid factor in aggravation is sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433).

For all of the foregoing reasons, appellant’s eight-year upper term is not effected by *Blakely*.

Blakely and Consecutive Terms

The *Blakely* rule does not apply to the determination to impose consecutive terms. That choice is made only after the defendant has been found guilty of separate crimes

beyond a reasonable doubt. No “statutory maximum” is violated if the defendant serves his terms consecutively. Unlike section 1170, subdivision (b), the statute governing consecutive sentencing has no provision mandating concurrent terms in the absence of aggravating factors. (§ 669.) Thus, a defendant who commits separate crimes has no legal right to concurrent sentences -- “and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” (*Blakely, supra*, 124 S.Ct. at p. 2540.) The imposition of consecutive sentences does not result in a usurpation of the jury’s fact-finding powers as long as each sentence imposed is within each offense’s prescribed statutory maximum. Although the laws permit a trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence -- not an enhancement. (*People v. White* (2004) 124 Cal.App.4th 1417, 1441.)

DISPOSITION

The judgment is affirmed.